

1 securities that were involved in repos as a matter of course  
2 and yet the repo participants were found to be "customers"--  
3 but, if the distinction is relevant, it appears to me to be  
4 clear that the customers here traded through Refco.

5 This is I think also supported by the economic  
6 realities that Mr. York testified to, and the documentation or  
7 absence thereof, of customers' relationship with RCM.

8 Generally, if one is not a customer under the Second  
9 Circuit case law that I referred to earlier, it's engaged in  
10 some other relationship as in Baroff, as an investor, an equity  
11 investor in the debtor, or as in SIPA v. Executive Securities  
12 Corp., as a lender to the debtor; that is, a lender other than  
13 in the sort of typical securities repo transaction that Bevill  
14 Bressler found to be covered by the customer definition.

15 Here, except in those few instances described by Mr.  
16 Clark where there were documented loans, there's no  
17 documentation of any loan to RCM, especially as related to  
18 RCM's hypothecation of securities that are no open margin or  
19 repo-accounts.

20 Obviously, also in addition to not getting any note  
21 or any other documentation, the customers didn't get any stock  
22 interest in any Refco entity in connection with that activity,  
23 which they claim they didn't know about and they weren't paid  
24 any interest for Refco's undocumented use of their securities.  
25 The testimony was that in Mr. York's view, the interest on such

1 a loan would be roughly four and a half percent, and at most,  
2 arguably, although the testimony was not particularly specific  
3 on this point, the benefits that the customers got from Refco's  
4 hypothecating for its own account were limited to perhaps  
5 saving half a percent when they actually did engage in  
6 financing. It cannot be reasonably said that this relationship  
7 was a debtor/creditor relationship, where the customers were  
8 lenders, or one where the customers were investors, in RCM or  
9 any other Refco entity.

10           It's also argued that the various times that trades  
11 failed may have indicated that you couldn't really trust RCM  
12 with your securities. It appears to me from the record,  
13 however, that those customers who had failed trades, and not  
14 all did, could not have discerned from the failed trades that  
15 the reason for the fail was that Refco was dealing with the  
16 securities in a way that would be inconsistent with taking a  
17 customer's orders and inconsistent with the customer agreement.

18           The testimony was, first and foremost, that if there  
19 ever was a "fail" it would be rectified usually within twenty-  
20 four hours but I think almost always, if not always, within  
21 forty-eight hours and that Refco never failed ultimately to  
22 execute the customer's request. It's also a fact or at least  
23 in the record that there are numerous explanations for failed  
24 trades, including the counterparty's failure, human error and  
25 the like. Given the appearance in the customer's statements,

1 which they received on a monthly basis at least and sometimes  
2 were able to check more frequently on line, that every failed  
3 trade went through, I find it hard to see how the existence of  
4 failed trades, which occur in the ordinary course of business  
5 although they're not in terms of number common, would have  
6 alerted customers, to the extent that this concept even applies  
7 in this context, that they could not reasonably rely on RCM to  
8 take their instructions.

9           It's also argued that Refco's financial statements,  
10 its public financial statements, which were certainly available  
11 to customers, should have alerted customers or would have  
12 alerted customers that RCM was engaged in practices that would  
13 have made it clear to them that they could not rely on RCM to  
14 undertake their orders and instructions. Of course, again,  
15 this is in the first instance belied by the customer statements  
16 which they received on a monthly basis, which showed the  
17 customers' orders being fulfilled and showed them being  
18 fulfilled in a way that reflected their ownership of the  
19 securities.

20           Moreover, based on my review of the financial  
21 statement disclosure that's relied upon by the objectors here,  
22 I conclude that that disclosure was at best ambiguous and would  
23 not have alerted customers to a problem that would rise to the  
24 level of leading them reasonably to believe that their orders  
25 would not be executed and RCM could not be relied on to return

1 their securities. In particular, the description of  
2 intercompany transactions does not suggest the type of  
3 receivable that would have caused someone to panic. Indeed, I  
4 think it's acknowledged by all that that customer fund "hole" -  
5 - to the extent again it's relevant and I understand the  
6 movant's argument that it is not relevant legally, but to the  
7 extent that that hole exists-- as Mr. Clark says, the extent of  
8 it has not been fully determined and certainly the cause of it  
9 has not been fully determined and was, as is evident by the  
10 fact it is still a mystery today, unknown I think prior to the  
11 bankruptcy.

12           So to the extent that the burden can be shifted to  
13 the customers to have to inquire as to whether they reasonably  
14 expected their orders in respect of their securities and cash  
15 to be honored I don't think they were on any sort of reasonable  
16 notice to question that fact.

17           Therefore, it appears to me that, having gone through  
18 the arguments raised by the objectors, the customers had every  
19 reasonable indication that they did own the securities,  
20 although if they were trading on margin RCM would have a  
21 collateral security interest in them for the margin loan, and  
22 it was reasonable for them to expect that those securities or  
23 infungible like property would be returned to them on their  
24 instruction. This applies in my view to ordinary course repo  
25 transactions as well as margin loans for the same reasons set

1 forth in the Bevill Bressler case at 67 B.R. 598. See also SEC  
2 v. Drysdale Securities Corporation, 785 F.2d 38, 42 (2d Cir.  
3 1986) cert denied 476 U.S. 1171 (1986), in which the Court  
4 assumed without deciding that repos are securities for purposes  
5 of applying the fraud provisions of the federal securities laws  
6 because the buyer takes title to the security and a major part  
7 of the consideration apart from the sale price is the seller's  
8 ability to perform the repurchase. See also In re:  
9 Residential Resource Mortgage Investments Corporation, 98 B.R.  
10 2, 21-23 (Bankr. D. of Ariz. 1989).

11 Now, with regard to there being a specific customer,  
12 according to the moving customer group's brief and the record  
13 set forth in this proceeding, IFS is a British Virgin Islands  
14 entity owned by a Mexican bank. It has approximately 300  
15 customers who engage in securities trading through IFS, in  
16 particular trading in equity securities, United States treasury  
17 securities and emerging market debt instruments. IFS conducted  
18 extensive trading on behalf of these customers until the  
19 moratorium issued on October 10, 2005 in a securities account  
20 administered with RCM. IFS and RCM are parties to a number of  
21 agreements relating to IFS's securities trading with RCM,  
22 including a prime broker agreement and a customer agreement.  
23 As I said before, under the customer agreement, which is  
24 governed by New York law, IFS granted authority to RCM to  
25 purchase, sell, borrow, lend, pledge or otherwise transfer

1 financial instruments for IFS's account in accordance with  
2 IFS's oral or written instructions.

3           From 2001 through October 2005 the person who dealt  
4 with RCM on behalf of IFS was Carlos Moreno, and the person he  
5 dealt with on behalf of RCM was his account officer in the  
6 Miami office, Mr. Alvarez, who was a director of that office.  
7 He started to work there in 1995. The Miami office was  
8 nominally an RSL office, although it had various designations,  
9 and all of approximately fifteen employees there were employed  
10 by RSL. Its business consisted almost entirely of facilitating  
11 securities trades for others, its customers or, as the debtor  
12 now calls them, clients-- that is in providing brokerage  
13 services to institutional Latin American clients that were  
14 predominantly investors in emerging market debt securities. It  
15 had no RSL customers and the only activity engaged in it on  
16 behalf of RSL was facilitating purchase and sales in emerging  
17 debt securities for other U.S. registered broker dealers. It  
18 had about 120 RCM securities customers who in the aggregate  
19 held approximately \$800 million of market value in securities  
20 on the bankruptcy petition date. It was largely independent  
21 from the New York office in that it had its own trade sales  
22 force who both took customers' orders and traded with Wall  
23 Street counterparties on their behalf and a middle office or  
24 back office that handled customers and customer securities and  
25 funds and generally performed corporate execution functions.

1 It didn't engage in any futures trading or foreign exchange  
2 activity except in respect of currency transactions to complete  
3 or facilitate the completion of securities trades in foreign  
4 securities. It did not provide financing. That was handled  
5 out of the New York office.

6 As generally with RCM, the Miami office engaged in  
7 securities transaction activity for the account of its  
8 customers. That is, it did not underwrite, act as a market  
9 maker, take proprietary positions or engage in any proprietary  
10 transactions for its account. When it purchased equities for  
11 its customers it acted as an agent. When it purchased debt  
12 securities it entered into essentially risk free back to back  
13 trades, denominated principal, trades which I've already  
14 discussed were in my view were trades for the account of its  
15 customers. It also acted as a settlement agent for customers  
16 who "traded away" and that occurred frequently. At times as  
17 part of the "one stop shop" model of RCM it acted as a  
18 custodian for the securities accounts of customers to  
19 facilitate their trading activity. As I said before, it also  
20 performed corporate services on behalf of customers. For  
21 example, if a Miami office customer needed to vote a security  
22 in connection with a tender offer or a restructuring that  
23 required corporate action, RCM's Miami office would facilitate  
24 that action.

25 IFS had an agreement with RCM that contemplated what

1 it referred to as "prime broker" services, in which RCM acted  
2 as the settlement agent, but, as noted in oral argument by  
3 various parties but for different reasons, I don't believe that  
4 such activities are necessary here to find IFS was a  
5 "customer," since the general business of RCM was facilitating  
6 customer transactions and orders.

7 IFS had every expectation that if IFS chose to sell  
8 securities in its account and have the proceeds returned to it,  
9 RCM would do so. In fact, in the ordinary course of its  
10 business IFS from time to time made such requests and until  
11 October 11, 2005 RCM always would sell securities and return  
12 the proceeds to IFS. See, for example, Exhibit 16 of the  
13 moving customer group which is the September account statement  
14 for IFS showing such a transaction. At no time before October  
15 10th did RCM ever refuse a request from IFS for the return of  
16 its securities, as testified to by Mr. Alvarez. As Mr. Alvarez  
17 testified generally, in his ten-year experience with RCM he  
18 never once had any difficulty complying with a client's demand  
19 for access to securities in the client's accounts before  
20 October 10<sup>th</sup>, 2005.

21 That changed, of course, on October 10th. On October  
22 11<sup>th</sup>, 2005, IFS demanded that RCM transfer its securities from  
23 RCM to another entity. Despite acknowledging that request, RCM  
24 did not do so.

25 On October 13th IFS wired into its account



1 approximately \$11.5 million U.S. to fully pay up outstanding  
2 margin loans relating to certain securities in its account and  
3 to facilitate their delivery. Even after this payment none of  
4 the securities were returned to IFS.

5 In light of the Court's direction in December of 2005  
6 to disclose customer account information, RCM delivered to IFS  
7 a statement of RCM's client accounts as of November 18, 2005,  
8 listing the securities that were then held in the IFS account  
9 and a percentage "hole factor" listing the securities or any  
10 portion thereof in the IFS account on that date. Approximately  
11 53 different securities are identified as having been held in  
12 the IFS account, all or nearly all of which form the basis of  
13 the claims of IFS against RCM on account of securities  
14 received, acquired or held by RCM in the ordinary course of its  
15 business as a stockbroker from or for the account of IFS for  
16 one or more of the purposes noted in Section 741, that is, for  
17 safekeeping, sale and purchase or as collateral.

18 I conclude based on the foregoing that IFS was a  
19 "customer" of RCM for purposes of Section 741(2) of the  
20 Bankruptcy Code in that it entrusted its securities to IFS --  
21 I'm sorry, to RCM-- for one or more of the purposes outlined in  
22 section 741(2) that this was in the ordinary course of RCM's  
23 and IFS's business and that IFS has claims of a kind set forth  
24 in 741(2)(b).

25 Of course, however, given the circularity in the

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1 definitions of "stockbroker" and customer, as Mr. Clark pointed  
2 out, I can't really find that IFS is a customer until I find  
3 that RCM is a stockbroker. However, I do find that RCM is a  
4 "stockbroker." The definition as I said before in addition to  
5 requiring that there be at least one customer as defined in  
6 Section 741 requires that the debtor be engaged in the business  
7 of effecting transactions and securities, either for the  
8 account of others-- essentially the "broker" definition under  
9 the securities laws-- or with members of the general public  
10 from or for such person's own account-- essentially the  
11 "dealer" definition under the securities laws. 11 U.S.C. §  
12 101(53A).

13           Much has been made in this litigation of the phrase  
14 in Section 101(53A)(B)(ii); that is, "with members of the  
15 general public." I note, however, that it appears only in that  
16 section and not in Section (b)(i). I recognize that the  
17 general trend in dealing with this industry is to conflate  
18 "brokers/dealers" and treat them as broker dealers recognizing  
19 that most parties engaged in brokering services also engage in  
20 dealing services, at least in a broad sense. But I think the  
21 fact that the statute here uses the phrase only in the section  
22 that has the debtor engaging in effecting transactions and  
23 securities from or for such persons own account is meaningful.  
24 That is, if I find that RCM was engaged in the business of  
25 effecting transactions and securities for the account of

1 others, I don't need to inquire what Congress meant by the  
2 phrase "with members of the general public."

3 That distinguishes this case from In re: SSIW, 7 B.R.  
4 735, in which this Court focused only on (b)(ii), the parties  
5 having previously stipulated that, if anything, the debtor in  
6 that case was a "dealer." As I think was clear from my  
7 discussion of Refco's -- I'm sorry, of RCM's business in the  
8 context of whether there is a "customer," I believe that RCM  
9 was in fact a broker engaged in the business of effecting  
10 transactions and securities for the account of others and, in  
11 fact, that that was its bread and butter business. It engaged  
12 in other business; for example, it engaged in a derivatives or  
13 futures business and engaged in an FX business, but it  
14 received substantial revenue from, and in fact, arguably, the  
15 most profitable aspect of its business was, its securities  
16 business, its securities brokerage business. Again, in my view  
17 that business was one where it took its customers orders in  
18 effectuating transactions for the customers' account.

19 Again, being a licensed dealer or broker is not a  
20 necessary condition for effecting such transactions, as set  
21 forth in Baker & Getty at 106 F.3d at 1261. See also In re:  
22 McMillen Wrap & Company, 30 F. Supp 40, 41, (D. Pa. 1941). It  
23 is very clear to me here that again these were not single,  
24 maverick transactions but a large element of RCM's business.

25 In this case, although I think it's unnecessary, I

1 also think that the "prime" brokerage or "trading away" aspect  
2 of the business was a significant part of the business-- not  
3 insofar as a source of money specifically attributable to such  
4 activity but, rather, in the role that this business had in  
5 helping RCM obtain customers and keep customers. But, again,  
6 that's not the primary focus of my opinion here.

7       Given that analysis, it's not necessary for me, I  
8 think, to parse through In re: SSIW Corporation's  
9 interpretation of the phrase "with members of the general  
10 public." I recognize the danger in doing so, in that it would  
11 be an alternative holding. Frankly, one of my reasons for  
12 disagreeing with that alternative holding -- I'm sorry. One of  
13 my reasons for disagreeing with SSIW's interpretation of the  
14 phrase "with members of the general public" is that it was an  
15 alternative holding in that case. The Court in that case made  
16 it clear that because no securities were actually delivered to  
17 or entrusted with the debtor there was no customer and,  
18 therefore, subchapter 3 wouldn't apply. But it went on  
19 nevertheless to consider whether Section 101(53A)(b)(ii) would  
20 apply even if for some reason there was a customer, and, as the  
21 parties all know reached the conclusion that the phrase "with  
22 members of the general public" for purposes of the Bankruptcy  
23 Code provision was meant to encompass only those who were, as  
24 stated in one version of the SSIW opinion, "passive, relatively  
25 uninformed investors" or in another section of the opinion "in

1 expert, passive, relatively uninformed investors who trade with  
2 members of regulated stock exchanges."

3           There may well be a limit to the scope of the phrase  
4 "members of the general public," but I do not believe that it  
5 is so narrowly limited as SSIW concluded. I believe that it  
6 reached that conclusion for two reasons that at least today  
7 shouldn't apply. The first is the Court took note of various  
8 opinions rendered in the context of applying the anti-fraud  
9 provisions of the U.S. securities laws which may have validly  
10 distinguished in that context between sophisticated investors  
11 and unsophisticated investors. As far as whether one who  
12 entrusts securities to a broker is concerned, although it may  
13 make sense to determine whether that customer entrusted  
14 securities willfully shutting its eyes to obvious practices by  
15 the broker or dealer that would lead one to believe he never  
16 should have entrusted the securities to the dealer or broker, I  
17 don't believe that the policy behind subchapter 3 is informed  
18 by the same policies as the anti-fraud provisions of the  
19 securities laws with respect to distinguishing between  
20 sophisticated and unsophisticated customers. Again, Subchapter  
21 3 has to do with the different priority that Congress believed  
22 should be accorded to those who gave over their securities or  
23 their cash to entities for the purpose of effectuating  
24 securities transactions. I don't think that should be limited  
25 to unsophisticated parties.

1           Indeed, even in the SSIW case, the Court makes a leap  
2 from references in other authorities to the securities laws  
3 protecting the general investing public to concluding that the  
4 "general public" means only relatively uninformed investors.  
5 As noted in a number of the cases, including the Hanover Square  
6 case, 55 B.R. at 235, which cites numerous Second Circuit and  
7 Southern District opinions, the first element of the customer  
8 definition in SIPA, which again is analogous to and can be  
9 applied to the customer definition in subchapter 3, is that the  
10 claimant entrusts cash and securities to the broker for some  
11 purpose connected with participation in the securities market.  
12 The claimant must be a "trading" or "public customer" who  
13 tenders his securities for the purpose of having them traded  
14 for his account by the broker "in the market."

15           It seems to me that that's the focus of -- the proper  
16 focus for interpreting the phrase "with members of general  
17 public" to the extent that RCM could be said to be a dealer.  
18 That is, it applies to those generally in the public trading  
19 with the debtor in the marketplace. And there is clear  
20 testimony here that RCM gave its customers access to the market  
21 and in fact was a leader in the emerging market securities  
22 market or the market for emerging market securities.

23           In addition, the SSIW case relies on what I think is  
24 a mistaken reading of SIPA, which is that SIPA itself,  
25 according to SSIW, was intended to protect, again, "inexpert,

1 passive relatively, uninformed investors." That is not my  
2 understanding of SIPA. Indeed SIPA is intended to protect them  
3 but also protects sophisticated entities who engage in customer  
4 trading with brokers or dealers regulated under SIPA. What  
5 SIPA is in fact I think intended to protect and what I believe  
6 in a lesser measure subchapter 3 was intended to protect is the  
7 reasonable expectations of those who engage in such trading in  
8 the marketplace with brokers or dealers that if they are not  
9 able to get their securities back or their fungible equivalent  
10 back they will at least participate with a priority with all  
11 other securities customers in the customer property fund, thus  
12 giving a measure of reasonable assurance to those engaged in  
13 the market in the U.S.-- with in the case of SIPA-- registered  
14 broker dealers and in the case of Subchapter 3-- all other  
15 broker dealers.

16 In that regard, I should note as a footnote that the  
17 fact that various customers received affiliate guarantees in  
18 respect of their assets at RCM only goes so far. Obviously  
19 it's not clear today even under the priority granted to them by  
20 subchapter 3 that RCM's customers will be made whole -- that  
21 is, subchapter 3 is not a guarantee of full payment. It only  
22 provides for a priority of what's -- a priority in respect of  
23 what's there in the customer fund. Indeed, customers in SIPA  
24 cases are not always paid in full. So the existence of the  
25 affiliate guarantee can provide some evidence that customers

1 didn't fully trust RCM but it also is potentially no more than  
2 evidence that it trusted RCM to at least live up to in the  
3 bankruptcy case the distribution scheme of Article 3 under  
4 Subchapter 3 which may or may not result in payment in full.  
5 So I conclude again that either under section 101(53A)(b)(i) or  
6 (b)(ii) was a "stockbroker."

7           Finally, it is argued that even though RCM is a  
8 stockbroker it's case should not be converted to one under  
9 subchapter 3 under Section 1112(b) of the Bankruptcy Code as  
10 amended by BAPCPA because of the unusual and extraordinary  
11 circumstances of this case. I think it's important to parse  
12 through the arguments made in that regard. I accept-- and  
13 it's the underlying premise for this being a preliminary or  
14 tentative ruling as opposed to a final ruling that I will  
15 ultimately issue-- that there is some basis under Section  
16 1112(b) for a court not to convert or dismiss a case even  
17 where, as here, on its face Bankruptcy Code section 109  
18 provides that the debtor is not eligible for relief under  
19 Chapter 11. That is because this is not an initial  
20 determination upon a filing but a motion to convert or dismiss  
21 under section 1112(b).

22           I note that no one is really asking me to dismiss the  
23 case except perhaps rhetorically. I think that recognizes the  
24 realities of this situation, which is that fundamentally this  
25 was a U.S. -based company and that in all likelihood if I



1 dismiss this case under Section 1112(b) it would be back in  
2 bankruptcy under Chapter 7 very soon thereafter, basically as  
3 soon as it took for three customers to sign a petition for  
4 involuntary relief.

5           It is clear to me that unusual circumstances here  
6 require the case to be converted or remain in Chapter 11 as  
7 opposed to being dismissed, in that more than ninety days have  
8 run and, therefore, significant rights that the parties relied  
9 upon in that period in respect of potentially voidable  
10 transfers could be lost.

11           It is also argued that in addition to not dismissing  
12 the case I should keep it in Chapter 11 and it's said so for  
13 various reasons. The first is that there would really be no  
14 harm or precedential value in doing so because this case is  
15 unique or close to it. I can't make that leap even though this  
16 is I suppose sui generis. There are other businesses like  
17 RCM's that engage in emerging market securities and other  
18 securities and knowing human nature, there will be bankruptcy  
19 cases involving them in the future to which this ruling will be  
20 a precedent.

21           It is also argued with some force and cogency that it  
22 is inequitable and unfair to convert this case because very  
23 clearly RCM had other customers who entrusted assets with RCM,  
24 for example, the FX customers' cash, but that arguably do not  
25 have the benefit of the priority accorded under subchapter 3 of

1 Chapter 7 to the securities customers. Unfortunately, I think  
2 this argument only goes so far. After all, Congress enacted  
3 that priority and it would be I think a remarkable step for me  
4 (although not under 105 clearly because there is some language  
5 supporting it in Section 1112(b)(1), that is the "unusual  
6 circumstances" language), to override a congressional priority  
7 because I felt that it was unfair.

8 Congress has more than once over the last several  
9 years recognized the rapid changes in the securities industry  
10 by expanding the provisions of the Bankruptcy Code to deal with  
11 repos, commodities trades and the like, most recently in BAPCPA  
12 by expanding the provisions of Section 362 that deal with  
13 various financial instruments. Given that, although I also  
14 recognize that it's quite possible that Section 741 et seq. is  
15 a bit of a legislative backwater, I can't assume that Congress  
16 somehow royally screwed up and that it should therefore  
17 override the priority scheme that it imposed in subchapter 3.

18 Now, I want to be clear that I am not, except in  
19 respect of IFS, determining that anyone is a "customer." It's  
20 conceivable to me, I suppose, that other customers of RCM may  
21 argue a broad definition of "securities" or what is a  
22 "security" and that's an issue for another day. But I don't  
23 believe that I can use 1112(b) to override the statutory  
24 priority that would apply ultimately to those who fit within  
25 the definition.

1           Finally, as I noted at the start of this ruling, I do  
2 believe however that there is a reason (a) to defer this ruling  
3 as a final ruling to give the parties time to pursue a  
4 potential global Chapter 11 plan for RCM and one or more other  
5 Refco entities and (b) to do so ultimately with the purpose of  
6 reducing costs in augmenting the estate. Mr. Goldin testified  
7 as to various ways that could, and perhaps should, be done.  
8 For example, having issued this ruling, although of course it's  
9 just that, a ruling by a bankruptcy court, it's always subject  
10 to appeal-- the parties have a good idea of at least one  
11 judge's view of the priority issue. On the other hand, knowing  
12 that fact, they should be better able to negotiate a plan that  
13 deals with intercompany claim issues, substantive consolidation  
14 issues and the like, as well as better able to deal with RCM's  
15 assets, a large portion of which Mr. Goldin testified (he  
16 believed roughly \$600 million worth of which) are illiquid  
17 securities that require active, intelligent hands-on management  
18 and very well should not be -- very well likely should not be  
19 subjected to the pressures of a requirement that they be  
20 promptly liquidated. I recognize that Section 748 of the Code  
21 has a "commercially reasonable" gloss on the requirement to  
22 liquidate, but under a Chapter 11 plan clearly the parties  
23 would have more flexibility in dealing with those assets.

24           So, for all of those reasons, it does seem to me that  
25 those latter circumstances are the "unusual circumstances" that

1 Congress may well have had in mind when it amended Section  
2 1112(b) last year and that these parties, all of whom are  
3 sophisticated and well represented, should be given the chance  
4 to work out their own agreements before they're imposed on them  
5 by a court.

6 Now, having said that, I don't intend to defer the  
7 changing of this tentative ruling into a final ruling  
8 indefinitely. I believe based on Mr. Goldin's testimony as  
9 well as additional information, including my sense of the work  
10 that's been done to date and the work that can be done now that  
11 this ruling has been issued, that the necessary steps in terms  
12 of marshalling information regarding claims and assets,  
13 including intercompany claims and assets, can be done with the  
14 proper diligence over the next month to two months, with my  
15 hope being that it would be within the next month.

16 I think, since deadlines do keep all parties focused  
17 on the task at hand, I should set a relatively short deadline  
18 before we come back here to see if that process continues to be  
19 one where unusual circumstances warrant my withholding issuing  
20 a final ruling. So I'll defer that ruling now for forty-five  
21 days. Clearly, in my mind that's not enough time to negotiate  
22 a Chapter 11 plan, but it is enough time to confirm that the  
23 steps are being taken that are necessary to do that, and that's  
24 what I'll essentially look to forty-five days or so from now.

25 MR. DESPINS: Your Honor, I'm so very sorry for

1 interrupting. I just want to point out that in the statute at  
2 one point they use the word unusual circumstances, but in terms  
3 of deferring your ruling the statute used the word compelling  
4 circumstance. I want to make sure that --

5 THE COURT: They're compelling. It's compelling in  
6 this sense: the dollars at stake here are so high. The cost  
7 of unnecessary litigation are so high, the dollars that can be  
8 saved are so high that although in terms of the -- perhaps the  
9 percentage of the total amount of the estate they're not  
10 overwhelming, I think they would be overwhelming to not only  
11 the average person but also the sophisticated person.

12 The second requirement that I'm going to impose deals  
13 with the other issue that I said I thought was really driving  
14 this proceeding and making it necessary to have in the first  
15 place, that is, the trial that we've gone through for the last  
16 six days and this ruling. That is, that I think that at this  
17 time recognizing that ultimately there is a right to conversion  
18 here if the parties can't negotiate a plan the parties, or more  
19 properly the RCM estate-- not just the moving parties but the  
20 RCM estate-- is entitled to a trustee. It would be entitled to  
21 a trustee under 1104(a)(2). That is not because of fraud,  
22 mismanagement and the like which is -- which are the factors  
23 enumerated in 1104(a)(1) but rather that it is in the interests  
24 of creditors and the estate to appoint a trustee for RCM. I  
25 say that because I think there will be a need to focus the

1 negotiations and a need to insure that RCM's creditors, all of  
2 them, are confident that an independent party is representing  
3 their interests as would be the case in a Chapter 7 case, that  
4 is, their interests as a group.

5           Having said that (and I will direct that, and as you  
6 may remember in my ruling with respect to the appointment of a  
7 trustee last month I adjourned the portion dealing with RCM  
8 recognizing that issues in respect of an RCM trustee would be  
9 further developed as part of this process and that's clearly  
10 been the case), therefore, this aspect of my ruling is a final  
11 ruling and not part of a tentative ruling. I'm resolving that  
12 adjourned portion of the trustee hearing and directing that a  
13 trustee for RCM be appointed by the U.S. Trustee after  
14 consultation with all of the appropriate parties in the RCM  
15 case-- that is, not only with the moving customer group but  
16 with the representatives of other customers on the FX side, the  
17 derivative side and the like.

18           Having said that, recognizing that there already are  
19 several very capable professionals who might genuinely think  
20 they are acting in the interests of all of the creditors in  
21 these estates, including Mr. Goldin and the Official Creditors  
22 Committee, I want to be very clear that the RCM trustee should  
23 rely primarily on his or her own business and legal judgment.  
24 I would hope that the U.S. Trustee would appoint a lawyer or at  
25 least someone very familiar, if it is a business person, with

1 the legal aspects of large Chapter 11 cases such as this with  
2 intercompany claims and similar issues. I'm not looking for  
3 this person to hire a large number of professionals to give him  
4 or her cover for his or her investigations and analysis. In  
5 fact, I don't believe that those types of people would end up  
6 being paid in this case if they were retained. The RCM's  
7 trustee's job here is to come up to speed quickly to perform  
8 his or her due diligence primarily based on review of the  
9 processes and procedures that the debtors and the committee and  
10 other parties have already gone through, not to reinvent the  
11 wheel, to confer properly with all of the parties in the RCM  
12 case and to focus on the key issues pertaining to a plan.

13 In light of that fact, I believe that, as I said the  
14 other day, the examiner's role in respect of RCM should be  
15 extremely limited, if there is any at all at this point, since  
16 I view that there would be essentially an overlap with the  
17 trustee and a trustee here, since he or she will have more  
18 power, should not only take the lead but should supersede the  
19 examiner's duties insofar as they would otherwise apply to RCM.  
20

21 So that order will be signed promptly. I'd ask the  
22 U.S. Trustee to submit it and I think it's basically a plain  
23 vanilla order. I have great confidence that the U.S. Trustee  
24 will fulfill her duties in consulting with all the parties and  
25 that she will appoint someone who will benefit not only the RCM

1 estate but, indirectly, all of the estates.

2 MR. CLARK: Your Honor, one point, a procedural  
3 point. In view of the Court's preliminary ruling and perhaps  
4 like Judge Gerber I may succeed in persuading Your Honor to  
5 change at some point but --

6 THE COURT: I don't think so. I'm sorry but that's  
7 something you ultimately will have to take upstairs. I'm  
8 serious. This is -- the term "preliminary ruling" has various  
9 meanings around the country. In the Ninth Circuit they're  
10 issued before the hearing. This obviously was not issued  
11 before the hearing. Except for the compelling circumstances  
12 here this would be a final ruling.

13 MR. CLARK: I do understand that, Your Honor. The  
14 point I was going to make is that as the Court may recall and  
15 in view of what the parties ought to be focusing on for the  
16 next forty-five days, in light of that you may recall that  
17 there is a stay in place for various litigations. That stay on  
18 its terms, on its face stays in place until the hearing on the  
19 Chapter 7 conversion motion that has been concluded and in  
20 light of that I would ask that the hearing simply be continued  
21 to the later date.

22 THE COURT: Well, I think that's what the statute  
23 says. That's the formulation of 1112.

24 MR. CLARK: Very good, Your Honor. Thank you.

25 THE COURT: So I will continue that hearing to a date



1 roughly forty-five days from today.

2           Now, as per that order -- I don't want to get into  
3 this now. I don't want people to start standing up on this  
4 point. Various parties are free to come in to me and say well,  
5 things have changed and I want my litigation accelerated, but I  
6 would hope that the parties here -- and they are all very well  
7 represented and they're all sophisticated and they can I think  
8 appreciate the value in making a good faith bona fide effort to  
9 resolve the case promptly on a consensual basis and they can  
10 also appreciate I think also that I'm not very sympathetic to  
11 litigation tactics-- that they should have a very good reason  
12 to do anything over the next forty-five days other than engage  
13 in good faith negotiations.

14           MR. CLARK: Very good. Thank you, Your Honor.

15           THE COURT: Okay.

16           MR. DESPINS: Your Honor, just two points of  
17 clarification. I understand what you said exactly but the fact  
18 that it's a preliminary ruling, but you don't intend to change  
19 your decision but from the point of view of the ten-day  
20 clock --

21           THE COURT: That's not running. That's not running.

22           MR. DESPINS: The second point, Your Honor, is given  
23 the trustee issue came up literally an hour ago, we have not  
24 had a chance to consult with the committee and --

25           THE COURT: I'm sure the U.S. Trustee will consult

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1 appropriately with everyone and balance the need for speed with  
2 the need to get everyone's views.

3 MR. DESPINS: Well, what I meant, Your Honor, is that  
4 the committee reserves whatever rights we may have regarding  
5 that decision. That's all.

6 THE COURT: Okay.

7 MR. DESPINS: I don't want my silence to be read  
8 as --

9 THE COURT: Agreeing to it. That's fine.  
10 Thank you.

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I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.

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Kathleen Price

Dated: 3/16/06